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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 1286

THE UNITED STATES ex rel. ANGELO RUSSO,
Petitioner,

vs.

WALTER NIERSTHEIMER, Warden, Illinois State Penitentiary, Menard Branch,
Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Since respondent has not been furnished a printed or otherwise paged copy of the transcript of record filed in this court, all references are to the pages in the printed transcript of record filed in the United States Circuit Court of Appeals for the Seventh Circuit.

The facts, which are not in dispute, are fully, concisely and accurately stated in the findings of the District Court. Those findings are as follows, *verbatim:*

The legality of his (petitioner's) original sentence is not challenged or questioned in this proceeding.

The crime for which the petitioner was convicted and sentenced carries a penalty under the Illinois laws of from one to ten years.

Upon the conviction of petitioner, he was taken from the Bar of the Court and delivered to the Warden of the Illinois State Penitentiary (Menard Branch).

On July 1, 1936, he was ordered paroled and on his application for out-of-state parole, he was ordered to do parole in the State of New Jersey, and pursuant he left the Penitentiary and went to the State of New Jersey on or about July 1, 1936.

On December 8, 1936, he was convicted of the crime of Assault and battery in the State of New Jersey, receiving a six months sentence.

On December 24, 1936, the Illinois Parole Board issued a parole violation warrant and on January 22, 1937, declared the petitioner by its order to be a defaulter on his out-of-state parole. The petitioner on the date the warrant was issued was serving time in New Jersey on the above sentence.

The above parole violation warrant was filed with the New Jersey officials having the petitioner in custody as a detainer. On January 24, 1937, the Illinois Penitentiary officials refused to execute the warrant on the ground that such officials had no travel expenses. Petitioner at the expiration of his sentence in New Jersey was released.

The petitioner thereafter remained at liberty until about January 11, 1939, when he was convicted of the crime of "Breaking with Intent" in the State of New Jersey, receiving a sentence of from five to fifteen years in the New Jersey Penitentiary.

On January 30, 1939, the Illinois Parole authorities issued a duplicable parole violation warrant and filed same as a detainer with the New Jersey Penitentiary officials.

On December 21, 1942, the Petitioner having been released from the New Jersey Penitentiary, waived extradition and was returned to the State of Illinois.

On January 11, 1943, after petitioner was returned to Illinois, he was heard by the Parole Board, declared to be a violator and passed for the maximum of his sentence which the Parole Board computes, will expire on September 2, 1947.

At the time the petitioner filed his petition for a habeas corpus in this Court more than ten years had expired from the date of his original sentence.

The petitioner is now in the Illinois State Penitentiary (Menard Branch) in the custody of respondent, who detains him under the original sentence. (Tr. pp. 32-33.)

ARGUMENT.

I.

Petitioner's contentions do not raise a substantial federal question.

Petitioner's argument may be briefly stated as follows: He contends that since Illinois officials failed to apprehend and reincarcerate him for his first violation of his parole, which was a simple assault and battery, therefore Illinois lost the right to take any cognizance of his second parole violation, which was the crime of a felonious burglary. He further contends that, although Illinois declared him to be a violator and issued a warrant for his arrest on his first violation, its failure to execute that warrant until he had committed a second and far more serious violation, for which a warrant was also issued, endows him with a constitutional immunity to service of the remainder of his original sentence on account of either his first or second breach of faith with the State.

The State of Illinois computes the time served by petitioner actually by confinement in the penitentiary and constructively by allowance of credit to petitioner for time

spent on parole prior to his first violation thereof, as follows:

May 13, 1935 (date of entry into Illinois State Penitentiary)	to	July 1, 1936 (date of release on parole)	—	1 yr. 1 mo. 18 days.
Credit for time from				
July 1, 1936 (date of parole)	to	December 8, 1936 (date of conviction for first violation)	—	5 mo. 8 days,
Time served from				
December 21, 1942 (date of return to Illinois State Penitentiary)	to	July 24, 1945 (date of filing instant petition)	—	2 yrs. 7 mo. 3 days.
				4 yrs. 2 mo. 1 day

Incidentally, it should be emphasized, as we have noted above, that although Illinois is not required by the United States Constitution to do so, and the Federal government would not do so if petitioner were a Federal and not a state prisoner (cf. *Zerbst* v. *Kidwill,* 304 U. S. 359), Illinois gives petitioner credit not only for all of the time actually served behind prison walls, but also for all of the time that petitioner was at large upon parole until his first violation of such parole.[1] The authorities have also allowed petitioner time off for good behavior notwithstanding the fact that he has not behaved well.

Therefore, although petitioner contends that Illinois' treatment is so cruel and unusual as to violate the Federal constitution, it appears that petitioner will be released when he has served only six years and three months of a ten-year sentence, of which service five months and eight days are credited for time during which he was on parole and of which only five years, nine months and twenty-two days will have been served within prison walls. It is sub-

[1] This is in accordance with applicable Illinois statutes. Ill. Rev. Stats. 1935, Ch. 38, par. 808. See *People* v. *Crowe,* 387 Ill. 53; *Purdue* v. *Ragen,* 375 Ill. 98 and *The People* v. *Dixon,* 387 Ill. 420.

mitted that the most forcible refutation of petitioner's contention is a clear statement thereof.

Petitioner's contention is in direct conflict with this court's decisions in *Anderson* v. *Corall,* 263 U. S. 193 and *Zerbst* v. *Kidwill,* 304 U. S. 359.

In *Anderson* v. *Corall,* cited above, this court considered on *habeas corpus* the case of a prisoner who, while on parole from the Federal penitentiary, was convicted of a crime against Illinois and sentenced to the Illinois penitentiary. The prisoner was not rearrested by Federal authorities until after the service of his sentence in Illinois, by which time the period of his original Federal sentence would have expired if he had served that sentence. But this court held that he had not served it. Although this court recognized that a prisoner "while on parole" and therefore "in the legal custody and under the control of the warden," so that such custody is "in legal effect imprisonment," nevertheless it held that "violation of the parole, evidenced by the warden's warrant and his conviction, sentence to and confinement in the Joliet penitentiary, interrupted his service under the sentence here in question," so that the prisoner's violation of the parole *"was in legal effect on the same plane as an escape from the custody and control of the warden."* (p. 196.) The court then held that, the prisoner having voluntarily interrupted constructive service of his sentence outside prison walls by violating his parole, he might be rearrested *after* the expiration of the time during which his sentence would have run if he had remained in the penitentiary or had properly conducted himself while at large on parole.

To the same effect is *Zerbst* v. *Kidwill,* 304 U. S. 359. A number of prisoners, while on parole from Federal penitentiaries, committed further offenses, for which latter

offenses they were convicted and received sentences. Upon these latter sentences they were returned to the same penitentiary from which they had been paroled. They contended that after the expiration of their second sentence, they could not be again or further incarcerated on account of their original sentences. This court, holding the contrary and speaking through Mr. Justice Black, said, at page 363:

> "• • • Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offence committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified. If the parole laws should be construed as respondent contends, parole might be more reluctantly granted, contrary to the broad humane purpose of Congress to grant relief from imprisonment to deserving prisoners."

But petitioner seeks to avoid the service of his sentence by adverting to the fact that, after his first parole violation in New Jersey, Illinois' administrative agents did not rearrest him and transport him from New Jersey to Illinois because they were without funds appropriated for that purpose.

The answer to this argument is that this court has held that the *status* of a parole violator may constitutionally be regarded as that of an escaped convict. (*Zerbst* v. *Kidwill; Anderson* v. *Corall,* both cited above.) It is not only the privilege but the duty of an escaped convict to return voluntarily and submit to the service of the unexpired portion of his sentence. The Illinois Supreme Court holds, and its holding is controlling here unless this court can say that it is so unreasonable as to deny due process, that a prisoner who violates the conditions upon which he is enlarged is required, voluntarily and under his

own initiative, to return to prison. He in effect promises to do so by going at large. He has only himself to blame if he does not keep the promise that gained him conditional freedom and can obtain no rights because the Illinois authorities fail to pursue and rearrest him. The Illinois rule is set forth in the case of *The People* v. *Ragen*, 392 Ill. 423, in language found at pages 427-428 and quoted in the margin.[2]

The contention that Illinois parole violators are entitled to their freedom if they are not arrested promptly after their violation has been repeatedly presented by such prisoners to the United States Circuit Court of Appeals. Although the decisions of that court are not authoritative here, the well reasoned opinions in the following cases decided by the Circuit Court of Appeals for the Seventh Circuit are in point by their logic: *Whitten* v. *Bennett*, 7th Cir., 141 Fed. (2d) 295; *U. S. ex rel. Turner* v. *Bennett*, 7th Cir., 153 Fed. (2d) 292; *U. S. ex rel. Kimler* v. *Ragen*, 147 Fed. (2d) 197; *Reed* v. *Colpoys* (D. of C.), 99 Fed. (2d) 396; similar contentions in *Dolan* v. *Swope*, 7th Cir., 138 Fed. (2d) 301.

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[2] "The contention that the failure of the officers of the law to return Krell to prison excuses him from serving the remainder of the term overlooks the fact that Krell initiated the move which produced his release from prison and that after the cause had been determined in the United States Supreme Court he acquiesced in further delay of his return by not surrendering to the warden. Under such circumstances he is in no position to say that service of the sentence is at an end, for to do so would be to permit him to be released from completing the sentence by reason of his own wrongful act. *Volker* v. *McDonald*, 120 Neb. 508, 233 N. W. 890, also cases in annotation, 72 A.L.R. 1271."

(Cf. the following incisive language from *Miller* v. *Evans*, 115 Ia. 101, 88 N. W. 198, 56 L.R.A. 101:

"* * * The time of its execution was not of the essence of the judgment, unless the prisoner, by demanding that it be immediately carried out, made it such. *It was his duty to surrender himself and submit to the penalty of the law, as well as that of the sheriff to inflict it; and, by taking advantage of the neglect of the latter and of the clerk, he cannot avoid the punishment which his wrong doing will be assumed to have justly required.*" (Emphasis supplied.)

These cases sustain as valid under the Federal constitution the well settled Illinois rule that a parole violator may be returned at any time even though his sentence would have expired had he served it in prison, and even though state officials have neglected or even refused to take affirmative steps to apprehend him. The Illinois rule is stated in *People* v. *Dixon,* 387 Ill. 420; *The People* v. *McKinley,* 371 Ill. 190; *The People* v. *Mallary,* 195 Ill. 582.

Petitioner's counsel exploits to the uttermost the decision of District Judge Shaw in *U. S. ex rel Howard* v. *Ragen,* 59 Fed. Supp. 376. This decision was the result of an inadvertent, most unfortunate and wholly baseless concession on the part of an Illinois assistant attorney general, who stated to Judge Shaw that under the laws of Illinois, there was no way in which a prisoner who had once violated his parole might thereafter, though repentant and contrite, expiate his offense by returning to the penitentiary and submitting himself to imprisonment for the balance of his term if the State officers did not actively pursue and rearrest him. This assistant attorney general even went so far as to indicate that even if a prisoner voluntarily returned to Illinois and sought by *mandamus* to compel the warden to reincarcerate him so that he might pay his debt to society, nevertheless under Illinois law such relief would be refused; and that he would be told that he must, until the end of his days, anticipate that at any moment he would be again locked up for an indefinite period of time if the authorities should elect to rearrest him. With such a statement in the record from an assistant attorney general, it is not entirely startling that Judge Shaw found want of due process. But there is no support whatever for this view of the Illinois law.

The contention of counsel for the petitioner in the instant case is predicated entirely upon the premise, regretably

conceded by the state in the case before Judge Shaw but never conceded in this case, that a prisoner is, in the language of the instant petitioner's counsel, "on a string" for the rest of his days if he once violates parole. This premise is simply without the slightest support in the law of Illinois.

We may note in passing that in any event, in the case before Judge Shaw the prisoner's sentence would have expired by its own terms before he was rearrested. All that Judge Shaw held (and his holding has been three times overruled by the Circuit Court of Appeals for the Seventh Circuit, see cases cited above) was that *after the time during which the sentence would have expired by its terms,* a prisoner might be reincarcerated. Although we do not agree with Judge Shaw's decision on that point, the case before him is quite distinguishable from the instant case; for in the case at bar the period for which petitioner was sentenced *had not expired when petitioner was rearrested,* and even under Judge Shaw's decision, on which counsel for the instant petitioner so heavily relies, the instant petitioner would be subject to rearrest and reincarceration.

The Illinois decisions cited above, all of which are directly in point and are conclusively adverse to the petitioner's contentions, must govern this case unless this court can say that the rule which they announce is so unreasonable as to offend a civilized sense of justice. That rule, so far as it is applicable here, is that a prisoner who violates his parole must return to the Illinois State Penitentiary and complete the service of his sentence or be subject to rearrest and reincarceration, notwithstanding the fact that the prisoner might have been arrested sooner for a previous violation of his parole. We submit that this rule is constitutional and should be sustained.

In conclusion, it should be observed that petitioner *twice* violated his parole. He asserts that the failure promptly to rearrest him for the first violation of his parole was the waiver of right to rearrest him not only for that first violation, but also for any subsequent violation of parole. In other words, what petitioner really contends is not only that, when parole authorities fail to arrest him promptly for a first violation of parole, he acquires a prescriptive right to violate his parole as often as he pleases but further that this supposed right is protected by the Fourteenth Amendment to the Constitution of the United States.

It is submitted that this contention does not raise a substantial Federal question and that therefore *certiorari* should be denied.

Respectfully submitted,

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